

DEPARTMENT OF STATE REVENUE

01-20182137R.ODR

**Final Order Denying Refund: 01-20182137R
Adjusted Gross Income Tax
For Tax Year 2016**

NOTICE: IC § 4-22-7-7 permits the publication of this document in the Indiana Register. The publication of this document provides the general public with information about the Indiana Department of Revenue's official position concerning a specific set of facts and issues. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Final Order Denying Refund.

HOLDING

Ohio Resident was not a professional gambler, thus while he was required to report his Indiana gambling winnings on his 2016 Indiana income tax return, he was disallowed from deducting his gambling losses.

ISSUE

I. Individual Income Tax - Adjusted Gross Income.

Authority: I.R.C. § 61; I.R.C. § 62; I.R.C. § 63; I.R.C. § 165; IC § 6-3-1-3.5; IC § 6-3-2-1; IC § 6-3-2-2; *Shollenberger v. C.I.R.*, 98 T.C.M (CCH) 667 (T.C. 2009); *Popovich v. Indiana Department of State Revenue*, 90 N.E.3d 704 (Ind. Tax Ct. 2017); [45 IAC 3.1-1-1](#); [45 IAC 3.1-1-2](#); [45 IAC 3.1-1-3](#); [45 IAC 3.1-1-4](#).

Taxpayer protests the Department's refund reduction for the 2016 tax year.

STATEMENT OF FACTS

Taxpayer is an individual resident of Ohio. During the 2016 tax year, Taxpayer visited various casinos located inside and outside of Indiana. For each casino visit, Taxpayer had some wagering gains and losses. Pursuant to Indiana tax withholding requirements, the Indiana casinos withheld income tax on Taxpayer's wagering gains and issued W-2G forms for these withholdings. Overall, Indiana casinos withheld approximately \$9,100 on Taxpayer's Indiana wagering gains.

Taxpayer reported his 2016 gross wagering gains on Schedule C of this 2016 Federal Income Tax return. While his gross wagering gains exceeded \$330,000, he had a net wagering loss of just over \$12,000. Taxpayer also filed an Indiana form IT-40PNR (Indiana Part-Year or Full-Year Nonresident Individual Income Tax Return), on which he reported zero Indiana income, and claimed he was entitled to a refund of the \$9,100 withheld by Indiana casinos on his Indiana wagering gains.

Upon reviewing Taxpayer's 2016 return, the Indiana Department of Revenue ("Department") increased Taxpayer's Indiana income, resulting in a reduction of Taxpayer's refund from \$9,100 to less than \$50. Taxpayer protested this reduction. An administrative hearing was scheduled, but Taxpayer opted to waive the hearing. This Final Order Denying Refund therefore results from information in Taxpayer's file and gleaned from telephone conversations with Taxpayer. Additional facts will be provided as necessary.

I. Individual Income Tax - Adjusted Gross Income.

DISCUSSION

The Department reduced Taxpayer's refund for the 2016 tax year, explaining that there were "inconsistencies" in his return. The Department provided Taxpayer with a line-by-line analysis of his 2016 return, showing his originally reported amounts and the Department's adjusted amounts. Taxpayer reported zero income in Indiana, but the Department increased that to almost \$240,000 based on its records. The result was a reduction in Taxpayer's refund from \$9,100 to just under \$50, which was refunded to Taxpayer in August of 2018. Departmental research resulted in an additional \$1,200 refund to Taxpayer in September of 2018, leaving approximately \$7,850 of refund at issue.

Taxpayer protested the reduction of his refund stating that his "Indiana gambling [e]arnings and [l]oss are included on my Federal Schedule C . . . The Internal Revenue Service has looked over and accepted my return . . . [and] the Federal Schedule C[] Professional Gambling Business Loss shows no monies due to Indiana." Taxpayer

provided a copy of each of his Indiana W-2Gs, Federal Schedule Cs, and Indiana IT-40PNR as originally filed. Taxpayer believes that he is entitled to the entire \$9,100 refund.

At the federal level, the Internal Revenue Code requires a taxpayer to report and pay his federal income tax when his gross income exceeds a certain amount. Gross income includes all income from whatever source derived. I.R.C. § 61(a). Thus, income from gambling winnings is also considered income subject to federal income tax. *Shollenberger v. C.I.R.*, 98 T.C.M (CCH) 667 (T.C. 2009). Losses generated from gambling activities are treated differently depending on whether a taxpayer is in the trade or business of gambling, i.e., a "professional gambler," or just a casual gambler. *Id.* at 2; I.R.C. § 62(a)(1). A taxpayer that is a casual gambler is only allowed to deduct his gambling losses as a Federal Schedule A itemized deduction. *Shollenberger*, 2009 WL 5103973 at 2 (noting the taxpayers/petitioners were casual gamblers and they were not entitled to an itemized deduction of their gambling losses because they elected the standard deduction when they filed their joint federal income tax return for the taxable year at issue.); I.R.C. § 63(e). Also, the casual gambler is allowed to deduct his or her losses only to the extent of the gains from such transactions. I.R.C. § 165(d). A professional gambler may deduct his gambling losses on a Federal Schedule C as a loss from a trade or business. Under I.R.C. § 62(a), losses from a trade or business carried on by a taxpayer are subtracted from a taxpayer's gross income to arrive at federal adjusted gross income.

For state income tax purposes, the presumption is that a taxpayer properly and correctly files his federal income tax returns. Thus, to efficiently and effectively compute what is considered Indiana income tax the Indiana statute refers to the Internal Revenue Code. IC § 6-3-1-3.5(a) provides the starting point for determining a taxpayer's taxable income, stating that the term "adjusted gross income" shall mean, "In the case of all individuals, 'adjusted gross income' (as defined in Section 62 of the Internal Revenue Code), modified as follows" The Department's Administrative Rules repeat the basic principle at [45 IAC 3.1-1-1](#), which states:

For individuals, "Adjusted Gross Income" is "Adjusted Gross Income" as defined in Internal Revenue Code § 62 modified as follows:

- (1) Begin with gross income as defined in section 61 of the Internal Revenue Code.
- (2) Subtract any deductions allowed by section 62 of the Internal Revenue Code.
- (3) Make all modifications required by [IC 6-3-1-3.5\(a\)](#).

In regards to nonresidents, IC § 6-3-2-1(a) and IC § 6-3-2-2(a) provide that income derived from Indiana sources is subject to Indiana tax. Therefore, a taxpayer with income from gambling activities in Indiana must report that income in Indiana and remit income tax to Indiana regardless of that taxpayer's residency. [45 IAC 3.1-1-2](#). Similar to the federal rules, Indiana treats losses generated from gambling activities differently depending on a taxpayer's classification as a professional gambler or a casual gambler. Indiana does not allow casual gamblers to deduct gambling losses on the Indiana return as those losses are reported as Schedule A itemized deductions at the federal level. [45 IAC 3.1-1-3](#); [45 IAC 3.1-1-4](#). Following the guidance of [45 IAC 3.1-1-1](#), professional gamblers may deduct gambling losses since those losses are business losses under I.R.C. § 62.

In the instant case, Taxpayer was required to report his Indiana gambling income on his Indiana tax return, which he did not. Whether he was then allowed to deduct his gambling losses turns on whether or not Taxpayer was a professional gambler. The Indiana Tax Court addressed this analysis in the recent case of *Popovich v. Indiana Department of State Revenue*, 90 N.E.3d 704 (Ind. Tax Ct. 2017). In *Popovich*, the Indiana Tax Court adopted "the two-part test set forth in *Commissioner of Internal Revenue v. Groetzinger*, 480 U.S. 23 (1987) and certain Treasury Regulation factors." *Id.* at 710. The two-part test "requires a taxpayer claiming to be engaged in the business of professional gambling to demonstrate that he is 'involved in the activity with continuity and regularity and that [his] primary purpose for engaging in the activity . . . [is] for income or profit.'" *Id.* The Indiana Tax Court set forth nine Treasury Regulation factors to help determine whether a taxpayer is engaged in an activity for profit. Those factors are:

- (1) the manner in which the taxpayer carries on the activity;
- (2) the expertise of the taxpayer or his advisers;
- (3) the time and effort expended by the taxpayer in carrying on the activity;
- (4) the expectation that assets used in the activity may appreciate in value;
- (5) the success of the taxpayer in carrying on other similar or dissimilar activities;
- (6) the taxpayer's history of income or losses with respect to the activity;
- (7) the amount of occasional profits, if any, which are earned;
- (8) the financial status of the taxpayer; and
- (9) the elements of personal pleasure or recreation.

Id. at 711.

The first step in the two-part test is the determination of whether a taxpayer is engaged in gambling activities with "continuity and regularity." According to the Indiana Tax Court in *Popovich*, "[t]o determine whether a taxpayer's gambling activity exhibits the requisite continuity and regularity, a reviewing court must examine the specific facts in the case." *Id.* at 711. "Courts generally have found, that a taxpayer's gambling activity is continuous and regular when the taxpayer gambles on a full-time basis and has no other source of employment or livelihood." *Id.* In the *Popovich* case, Mr. Popovich provided evidence that he gambled sixty days a year for five to six hours at a time and spent approximately ten hours a week studying blackjack. Mr. Popovich also presented a schedule showing how often he gambled and his win/loss record. There were inconsistencies in Mr. Popovich's records, but even if they were accurate, his records show that he was gambling no more than five days a week. Further, there was evidence suggesting that Mr. Popovich was receiving income from his wife's company and that his involvement in her company may have been more than what he led on. Based on these facts, the "Court [was] unconvinced that Popovich's gambling was regular and continuous." *Id.* at 714. Further, "[h]aving found the evidence is inadequate to support Popovich's claim that he gambled with the continuity and regularity necessary to be considered a professional, the Court need not inquire into his profit motive . . ." *Id.* The Court chose to go through the profit motive analysis however, as the issue was one of first impression in Indiana.

In the instant case, the Department asked Taxpayer to provide a log of his gambling activities, however Taxpayer was unwilling to do so. From the W-2Gs Taxpayer provided, it is clear that Taxpayer spent at least fifty-nine days gambling in Indiana in 2016. Further, Taxpayer provided a copy of his 2016 Federal Schedule C for both his gambling activities and an automotive business. On the Federal Schedule C for the automotive business, Taxpayer indicated that he "materially participated" in the operation of the business and the business earned a profit in 2016. "[A] taxpayer's gambling activity is continuous and regular when the taxpayer gambles on a full-time basis and **has no other source of employment or livelihood.**" *Id.* at 711 (**emphasis added**).

Despite the lack of a gambling log or other such documentation, the Department can determine that Taxpayer's gambling activities were not continuous and regular because Taxpayer had another source of employment or livelihood in the automotive business. Therefore, no further analysis is required. Because Taxpayer's gambling activities were not continuous and regular, Taxpayer does not qualify as a professional gambler; he is a casual gambler, and his gambling losses are not deductible on his Indiana return. Taxpayer's protest is denied.

FINDING

Taxpayer must include his Indiana gambling winnings on his Indiana return. Further, Taxpayer does not qualify as a professional gambler, thus his gambling losses are properly disallowed on his Indiana return.

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